ABU SAMAH RAHMAT

v.

TALASCO INSURANCE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[CIVIL APPEAL NO: R1-11-54-97]
3 NOVEMBER 1999

INSURANCE: *Motor insurance - Claims - Insurer's liability - Claims for cost of repairs to car - Policy holder allowing third party to use car on payment of money - Whether car hired to third party - Whether hiring assumed a business transaction - Whether insurer could repudiate claim - Whether limitation clause in policy applied - Consideration of Albert v. Motor Insurer's Bureau*

The plaintiff allowed one Wan Rosli to use his car in return for a certain reward. While driving the car, Wan Rosli lost control of same and the car collided against the side of the hill and suffered severe damage. The plaintiff claimed from the defendant, the insurer of the car, RM15,203.81 being the cost for repairs to the car. The defendant sought to repudiate the claim on the ground that the plaintiff had hired the car to a third person and was precluded from claiming by virtue of the limitations clause in the policy. The learned magistrate concluded that the policy did not cover the use of the car for hire, and, upon her conclusions that the plaintiff had hired the car to Wan Rosli **or** had at least permitted the car to be used by Wan Rosli for money, dismissed the plaintiff's claim. The plaintiff appealed and argued that on the facts, the defendant had failed to bring the case within any of the exceptions in the insurance policy in question.

Held:

[1] In this case, if there is a definite finding of hiring in the sense of a legally binding contract by the parties then it is caught by the limitations clause.

[2] The test in *Albert v. Motor Insurer's Bureau* whether the motor vehicle has been used for "hire or reward" (*ie*, "the business test") is applicable, although this is not a case of a motor vehicle for carrying passengers for hire or reward as in *Albert's* case. The test in *Albert* is based on sound principles and reasoning as to what constitutes "hire or reward" arising from cases relating to insurance policies.

[3] The magistrate did not categorically say that the plaintiff had hired the car. She did not rule out that Wan Rosli had given the plaintiff an amount of money so that the plaintiff would allow him to use the said car. In the context of Wan Rosli's evidence that money was given as "coffee money" to the plaintiff for the use of the car, the transaction was not a transaction having the character of a business arrangement in the sense stated in *Albert's* case.

[4] If the finding of the learned magistrate here had been a finding **simpliciter** that there was a definite hiring of the car by the plaintiff to Wan Rosli in the sense of there being a binding contract between them for the hire, the use of the car for hire would be excluded by the limitations clause from coverage of the insurance policy and the magistrate would have been right in dismissing the claim. However, her finding was that it could also have been that Wan Rosli had paid the plaintiff some money for permission to use the car. Since there was this probability, one cannot rule out the view that the paying of whatever amount by Wan Rosli to the plaintiff was on an isolated occasion where there was no element of business about it. In the circumstances the magistrate was wrong to conclude that the limitations clause applied.

[Appeal allowed; defendant not entitled to repudiate claim.]

Case(s) referred to:
Albert v. Motor Insurer's Bureau [1971] 2 All ER 1345 ***(refd)***
Malaysia National Insurance Sdn Bhd v. Malaysia Rubber Development Corpn [1986] 2 CLJ 285 ***(refd)***
Motor Insurers' Bureau v. Meanen [1970] 2 All ER 1372 ***(refd)***

Legislation referred to:
Road Traffic Act 1960, s. 203(4)

For the appellant - Ivan Ho; M/s Ho & Rakan-rakan
For the respondent - Wan Kuzaini; M/s Othman Hashim & Co

Reported by WA Sharif

JUDGMENT

KC Vohrah J:

This is an appeal from the decision of a Kuala Lumpur magistrate who dismissed the action of the plaintiff. The claim was principally for the cost of repairs made to the plaintiff's car against the defendant insurance company under an insurance cover.

The car of the plaintiff was used by his friend, Wan Rosli, on 12 December 1992. While Wan Rosli was driving the plaintiff's car, registration number BCM 6714, along the Kuala Lumpur-Karak highway, one of the tyres burst. Wan Rosli lost control of the car and it collided against the side of the hill. The car was severely damaged and the plaintiff paid for the repairs made to the car.

The claim of RM15,203.81 for repairs to the car and other connected amounts against the defendant insurance company was made under an insurance cover issued for the use of the said car by the defendant. The defendant resisted the claim on the ground that the plaintiff had hired the car to a third person, Wan Rosli, and the insurance policy did not cover such use as its use was excepted from the policy under a clause.

The learned magistrate found as a fact that Wan Rosli had paid money to the plaintiff for the use of the car; she concluded that the plaintiff had hired the car to Wan Rosli or had at least permitted the car to be used by him for an amount of money. She dismissed the plaintiff's claim.

The plaintiff appealed to the High Court.

The first argument of the plaintiff's counsel was that the magistrate was wrong in coming to her finding of fact that the plaintiff had hired his car to Wan Rosli and that, relying on *Malaysia National Insurance Sdn Bhd v. Malaysia Rubber Development Corporation* [1986] 2 CLJ 285; [1986] 2 MLJ 124, the defendant company had failed to bring the case within any of the exceptions of the insurance policy of the defendant insurance company.

I have gone through the notes of proceedings in the magistrates' court and the grounds of decision of the magistrate. The magistrate has carefully gone through the evidence of Wan Rosli who had admitted making a statement (D9) to DW2, an "insurance adjuster", who had been appointed by the defendant to investigate the accident involving the plaintiff's car. In that statement Wan Rosli had admitted that he had "rented" the car from the plaintiff for RM60. In evidence Wan Rosli also stated that "maybe" he gave "coffee money" for the loan of the car.

The magistrate, after examining all the evidence including the evidence of Wan Rosli and the evidence of DW2 and the written admission, found, in essence, that money had passed from Wan Rosli to the plaintiff for the use by Wan Rosli of the plaintiff's car and she concluded that Wan Rosli had paid RM60 for the hire of the car or had given him an amount of money so that the plaintiff would allow him to use the car.

Quite clearly the magistrate did not categorically say that the plaintiff had hired the car. She did not rule out that Wan Rosli had given the plaintiff an amount of money so that the plaintiff would allow him to use the said car. In the context of Wan Rosli's evidence that money was given as "coffee money" to the plaintiff for the use of the car I do not see that as being a transaction having the character of a business arrangement in the sense as that stated in *Albert v. Motor Insurer's Bureau* [1971] 2 All ER 1345.

Counsel for the plaintiff had argued that one single hiring does not constitute hiring within the meaning of the clause in the insurance policy. I disagree. If there is a definite finding of hiring in the sense of a legally binding contract by the parties then it is caught by the limitations clause. The clause reads:

> Limitations as to Use:
>
> Use only for social, domestic and pleasure purposes and for the Policy holder's business.
>
> The Policy does not cover use for hire or reward, ... (see p. 116 of Appeal Record).

Counsel relied on the House of Lord's case of *Albert.*

It will be noticed that the limitations clause in our case under appeal does not state that the limitation is in regard to the carriage of passengers for hire or reward. The *Albert* case revolves on the statutory interpretation of a proviso to s. 203(4) of the Road Traffic Act 1960 which restricts the freedom not to insure passengers in the case of a vehicle in which passengers are covered "for hire or reward." The House of Lords were unanimous in this judgment that a passenger could be covered for hire or reward even though there was no legally binding contract. Various tests were offered. Lord Donovan spoke of the "business test" (see 1353) stating:

> The test which I favour, namely, has there been a systematic carrying of passengers for reward which goes beyond the bounds of mere social kindness? – which I may call for short the "business test" ...

Lord Pearson expressed a somewhat similar approach as to whether arrangements for the carriage of passengers acquire the character of business arrangements.

It will be noted that the House of Lord's case of *Motor Insurers' Bureau v. Meanen* [1970] 2 All ER 1372 made reference and relied on the principles in *Albert's* case for the court's decision.

In our case the motor vehicle was used by a third party after he had paid some money to the policy holder of the insurance cover for the car to use it. It seems to me that the test in *Albert's* case whether the motor vehicle has been used for "hire or reward" can be applied to our own case although it is not a case of a motor vehicle for carrying passengers for hire or reward as in *Albert's* case as the test is based on sound principles and reasoning as to what constitutes "hire or reward" arising from cases relating to insurance policies.

If the finding of the magistrate in our case had been a finding **simpliciter** that there was a definite hiring of the car by the plaintiff to Wan Rosli in the sense of there being a binding contract between them for the hire I would say that the use of the car for hire would have been excluded by the limitations clause from coverage of the insurance policy and the magistrate would have been right in dismissing the claim. However, her finding was that it could also have been that Wan Rosli had paid the plaintiff some money for permission to use the car. It will be remembered that the magistrate had come to this conclusion because she took into account Wan Rosli's evidence that maybe he did give coffee money for the loan of the car. Since there was this probability which the magistrate had not ruled out, one cannot rule out the view that the paying of whatever amount by Wan Rosli to the plaintiff was on an isolated occasion where there was no element of business about it. In the circumstances the magistrate was wrong to conclude that the limitations clause applied.

In view of the finding of fact that the magistrate had made, the defendant is not entitled to repudiate the claim. I allow the appeal of the plaintiff.

Appeal allowed. Costs here and below to the plaintiff.